

# COMMONWEALTH OF VIRGINIA

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## VIRGINIA HOUSING COMMISSION

### SUMMARY

#### **Affordability, Real Estate Law and Mortgages Work Group**

**July 31, 2012**

**1:30 PM**

**House Room C**

#### **I. Welcome and Call to Order**

- **Delegate Danny Marshall, Chair**; called the meeting to order at 1:30 PM.
  - In addition to the invited speakers the following Work Group members were in attendance:
    - **Workgroup Members:** Del. Marshall, *Chair*; Delegate Rosalyn R. Dance
    - Mark Flynn, *Virginia Municipal League*; T. K. Somanath, *Better Housing Coalition*; Robert N. Bradshaw, *Independent Insurance Agents of Virginia*; Tyler Craddock, *Manufactured and Modular Housing Association*; Chip Dicks, *Virginia Association of Realtors*; Brian Gordon, *Apartment and Office Building Association*; Kelly Harris-Braxton, *Virginia First Cities*; Kelly King Horne, *Homeward*; Alexander Macauley, *Citigroup*; Judson McKellar, *Virginia Housing Development Authority*; R. Schaefer Oglesby, *Virginia Association of Realtors*; Michael Toalson, *Home Builders Association of Virginia*; and Michele Watson, *Virginia Housing Development Authority*
    - **Staff:** Elizabeth Palen, *Executive Director of VHC*; and Laura Perillo, *VHC Legal Intern*

#### **II. False Advertising; liability of real estate brokers and salespersons; exemption (HB 724, Del. D. Yancey, 2012) *Brown v. Labelle***

- **Ms. Laura Perillo, VHC Staff**; explained the facts surrounding *Brown v. Labelle*.
  - **Ms. Perillo** stated that the first owner of the home in question started but never completed converting her 540-square-foot garage into livable space. Ms. Perillo continued, stating that the first owner listed the home and did not include the garage as livable space, due to the incomplete nature of the project. Ms. Perillo explained that the first owner sold the house to the second

owner, a real estate broker and professional house-flipper named Labelle. Ms. Perillo stated that Labelle remodeled the garage space to include a bathroom, second kitchen, a bedroom, and a den without the proper permits and in violation of code requirements. Ms. Perillo stated that Labelle then listed the home through the Prosperity Realty, for which he was an agent. That listing included pictures illustrating the completed conversion of the garage and stated that the renovation was completed by professionals.

- **Ms. Perillo** explained that Brown entered into contract to purchase the home from Labelle on August 29, 2009. Ms. Perillo stated that on November 4, 2009 Brown entered a settlement and obtained legal title to the home and the right to enter it. Ms. Perillo continued, stating that weeks after Brown moved into the home several experts told him: (1) the garage would have to be demolished and rebuild in order to comply with code, (2) that this renovation would cost no less than \$45,000, and (3) that the oven could not be included in the rebuild. Ms. Perillo explained that Brown sued Labelle, Prosperity Realty, and Prosperity Realty's insurance company on September 23, 2011 for false advertising, among other things.
  - **Ms. Perillo** stated that to recover for false advertising in Virginia, a plaintiff must prove: (1) the defendant intended to sell or otherwise dispose of the home or merchandise at issue; (2) the defendant caused to be made an advertisement of any sort regarding the home; (3) the advertisement contained a promise, assertion, representation, or statement of fact that was untrue, deceptive, or misleading, and (4) the plaintiff suffered a loss as a result. The Prosperity Realty moved for a Plea in Bar, because they claimed that the 2-year statute of limitations had run. In its opinion, the circuit court stated that the statute of limitations period begins to run from the date of the injury to a person or property, and not when the resulting damage is discovered. In its opinion, the court stated that the first three elements of the cause of action were present before the parties entered into the contract to sell the home. The court found that the cause of action accrued when Brown took legal title of the home at settlement, on or about November 4, 2009. This is because Brown had the right to enter the property, make repairs, and bring suit seeking damages only after the sale was completed. Thus, the action was filed within the two year statute of limitations allowed by the Code. The Court overruled Prosperity Realty's Plea in Bar.
- **Mr. Chip Dicks**, *Virginia Association of Realtors*; stated that he and Mr. Steve Pearson who represents Trial Lawyers, have been redrafting a bill regarding liability of real estate brokers and salespersons. Mr. Dicks stated that Mr. Pearson was unable to attend the work group meeting due to a vacation scheduled prior to the meeting. Mr. Dicks provided a review of HB 724 and his proposed redraft.
    - **Mr. Dicks** stated that a bill was passed in 1995 that requires real estate agents that represent a seller, buyer, landowner, tenant or property manager to represent their clients to the best of their ability. Mr. Dicks explained that included in this bill are standards for compliance with that requirement. Mr. Dicks further explained that two years ago, Del. Jackson Miller edited the

former bill to include sections that provide realtors and real estate licensees with immunity from liability in certain circumstances. Mr. Dicks described some of those circumstances by way of examples:

- **Mr. Dicks** stated that if he were a real estate agent and he looked at the tax records in Newport News, he could rely on those tax records. Mr. Dicks explained that if the tax records he relied on happened to be incorrect, he would not be liable as a real estate licensee.
  - **Mr. Dicks** stated that if he were a real estate licensee and he went to the surveyor that the property-owner hired, reviewed the survey, found that the survey made sense and relied on the survey, then the real estate licensee cannot be sued over the survey.
  - **Mr. Dicks** stated that if he were a real estate licensee and the seller-owner of a home tells him that there has never been a leak in the house and Mr. Dicks has no reason to believe otherwise, then he can rely on the seller-owner's statement as being truthful without repercussion.
  - **Mr. Dicks** also explained that real estate brokers and licensees were immune from liability where they relied on official information from a government enterprise (such as tax revenue information) or a non-governmental enterprise that obtained the information from a government entity.
- **Mr. Dicks** stated that during a case he dealt with in Newport News in which a real estate licensee was sued, the plaintiff's attorney stated that the real estate licensee committed criminal false advertising under §18.2.216. Mr. Dicks explained that in order to be convicted of a crime, one must have criminal intent. Mr. Dicks stated that the fact that there is a negligent or innocent misstatement in an advertisement should not make the real estate licensee responsible for the advertisement criminally liable. Mr. Dicks explained that Delegate Yancey wanted to prevent plaintiff's attorneys from threatening criminal offenses against real estate licensees for false advertising during civil cases.
  - **Mr. Dicks** explained that a federal court has found that in order to file suit against a real estate licensee under the circumstances described above, a civil conviction of a criminal law may occur without a criminal conviction of that same law. Mr. Dicks further stated that §59.1-68.3 states that to sue civilly on the basis of a criminal law, one must sue for damages. Mr. Dicks explained that one of the problems he has encountered is that attorneys suing under the aforementioned circumstances are failing to sue for damages. Mr. Dicks stated that that is one of the reasons that he and Mr. Pearson want to explicitly add that a plaintiff in these instances must have suffered an actual loss.
  - **Mr. Dicks** stated that Delegate Yancey was informed that plaintiffs' attorneys were alleging violations of the Consumer Protection Act and violations of the Home Solicitation Act, which have enhanced civil penalties. Mr. Dick stated that the Consumer Protection Act expressly excludes real estate licensees unless there is some intentional or fraudulent act committed. Mr. Dicks stated that the Home Solicitation Act is not applicable to those situations where the property is not the primary residence of the owner.

- **Mr. Dicks** explained that trial lawyers have several concerns: (1) they want to make sure that they can continue to sue real estate licensees when there has been false advertising, and (2) they want to make sure that there is no requirement that a criminal conviction be had in order to be able to sue under a criminal act. Mr. Dicks stated that the trial lawyers agree that it is improper for an attorney to threaten a criminal action against a litigant which is affectively what has been happening.
- **Mr. Dicks** explained that this is a complex issue and that it is not the type of problem that usually comes before the Housing Commission, but that it has gotten to the Commission because it deals with real estate liability.
- **Mr. Mark Flynn, Governor Appointee;** stated that as the law is written, it seems that a realtor or real estate company could only be subject to civil action after it had been convicted of a criminal action.
  - **Mr. Dicks** stated a criminal conviction is not necessary for a loss to be suffered. Mr. Dicks stated that if the General Assembly meant to say "conviction" the law would have included that language and that a federal judge has said so in *Rehabilitation Specialists v. Augustine Medical*.
  - **Mr. Flynn** stated that he still thinks that a violation of a criminal law means a conviction and that this may be confusing for others as well.
  - **Mr. Dicks** agreed that it is confusing but that case law supports his interpretation.
- **Mr. Michael Toalson, Home Builders Association of Virginia;** asked whether this issue is another consequence of the economic downturn. Mr. Toalson asked whether this issue has gotten more common since people have started to see "good deals" turn into "bad deals" over time.
  - **Mr. Dicks** stated that real estate agents are responsible to the real estate board even in their activities as landlords, developers, etc. Mr. Dicks continued, stating that when people want to get out of their property transactions then lawyers look at ways to get out of the transaction-- including looking for a criminal offense.
- **Mr. Robert N. Bradshaw, Independent Insurance Agents of Virginia;** asked Mr. Dicks to explain the strike out in line one of the bill draft.
  - **Mr. Dicks** stated that the purpose of the strikeout in line one is to ensure the immunity is not applying to real estate law.
- **Mr. Bradshaw** asked if the bill draft became a law as it is written, would there have been a different outcome in *Brown v. Labelle*.
  - **Mr. Dicks** stated that *Brown v. Labelle* would have been different in that there would not be an allegation of a criminal offense unless there was a specific damage claim arising from that criminal law. Mr. Dicks explained that the bill, if passed as written, would require the criminal conviction to occur before an individual would have the ability to file civil cause of action. Mr. Dicks explained that an attorney cannot threaten a criminal offense during a civil offense under this new bill. This will then affect errors and omissions insurance as to whether or not a policy covers intentional acts; however, it does not preclude or protect the errors and omissions insurance carrier from defending over these particular issues.

### III. **Licensing Title Agents;** licensure requirement for title examiners and title settlement agents

- **Ms. Deborah Allen**, *Virginia Land Title Association (VLTA): Bridge Trust Title Group*; **and Ms. Myrna Lou Keplinger**, *VLTA: The Settlement Group*; collectively gave the Commission some background information on title examiners and title settlement agents - what they do and how their work benefits the general population:
  - **Ms. Allen** explained that in order to close on real property, the following must occur: (1) the title is examined by title examiner, (2) the title examiner produces a title report which describes any adverse matter in the record title that must be addressed and submits it to a title insurance provider (which are licensed and regulated by the state), and (3) when all title issues are addressed, the closing or settlement occurs.
    - **Ms. Allen** defined title examiners as individuals who physically travel to the Circuit Court Clerk's office to access the land records needed to conduct a title examination or accesses those land records via remote access electronically. These individuals may be independent contractors, may work for one or more title insurance producers, or may be direct employees of a title insurance provider.
    - **Ms. Keplinger** defined title settlement agents as individuals who prepare the documents and conduct the closing transactions.
  - **Ms. Keplinger** stated that accordingly, the land title industry insures that people have clear ownership rights to their homes and other properties. Ms. Keplinger stated that because of the land title industry: (1) Americans close on their loans in about 30 days which is much faster than in any other country, (2) \$1.75 billion is collected per year in back income taxes, (3) \$3 billion is collected per year in delinquent real estate taxes, and (4) \$325 million is collected per year in delinquent child support payments. Ms. Keplinger also stated that the land title industry spends \$225 million per year to correct errors in the public property records that would lead to serious impairment to the property rights of millions of people and pays \$170 million per year to purchase copies of recorded documents for local governments.
  - **Ms. Allen** explained that in the past, title examiners would work for an attorney, title agent, or title underwriter. Ms. Allen explained that at that time, the professionals for whom the title examiners worked for would train the title examiners on how to examine titles. Ms. Allen explained that in recent years, however, many title examiners are "freelance" or independent contractors. Ms. Allen explained that these title examiners receive little education on how to examine titles.
  - **Ms. Keplinger** explained that title insurance is different from other types of insurance because: (1) people pay for their owner's policy once and the policy never expires, and (2) the title insurers work to eliminate the risk upfront through title examinations.

- **Ms. Allen** stated that the Code of Virginia provides guidance regarding who may provide escrow, closing, and settlement services for real property located in the Commonwealth, but does not contain any provisions for qualifications, education or licensure of those who provide said services.
- **Ms. Allen and Ms. Kiplinger** explained the various problems that have arisen in the land title industry.
  - **Ms. Allen** explained that where a problem arises regarding the title, this
  - are due to title search errors. Ms. Kiplinger stated that in 2011 losses in claims were in excess of \$19.4 million.
  - **Ms. Kiplinger** explained that the annual title insurance underwriter audits do not universally identify bad habits. Ms. Kiplinger stated that the \$250,000 minimum requirement for errors and omissions and/or malpractice insurance does not always cover the cost of a claim. Ms. Kiplinger also stated that the \$100,000 blanket fidelity bond or employee dishonesty insurance can be waived if the title settlement agent has no employees outside of the owners, partners and shareholders.
- **Ms. Allen and Ms. Kiplinger** explained their proposed regulations and licensing requirements for title examiners and title settlement agents.
  - **Ms. Allen** explained that VLTA envisions the licensing process of title examiners and title settlement agents to mirror existing licensing requirements for title insurance agents. Ms. Allen stated that the current certification programs for these professionals would be increased to a 16-hour pre licensing study course-- the content and instructors of which must be approved by the Virginia Insurance Continuing Education Board. Ms. Allen stated that these professionals would have to pass their TE or TSA examination within one year of completing the pre licensing course. Ms. Allen also stated that these professionals would be required to complete 16 hours of continuing education every two years with 50% of the credits to be provided by the VLTA.
  - **Ms. Kiplinger** explained the types of regulations VLTA and the Bureau of Insurance have considered with regard to title agents.
  - Ms. Kiplinger stated that licensing could require title agents to have uniform basic education for searching titles, credible standards for title searches and real estate settlement practices, and ethics training.
  - **Ms. Kiplinger** stated that the aforementioned requirements would reduce the problems that consumers and insurance providers encounter which may lead to claims.
- **Mr. Bradshaw** asked Ms. Allen whether VLTA had a bill they wanted the Commission to look at.
  - **Ms. Allen** explained that VLTA was told to present their position to the Commission and that the Commission would draft a bill if they agreed with VLTA's position.
- **Mr. Bradshaw** asked whether Ms. Allen was aware of any other state that licenses title settlement agents and/or title examiners.
  - **Ms. Allen** stated that Utah's code includes a three-prong license which includes a license as a title insurance agent, a title settlement agent (which Utah's code refers to as "title escrow officer"), and a title examiner.

- **Mr. Bradshaw** stated that in the past, the Code of Virginia required insurance agents to complete 42 hours of pre licensing study before individuals were eligible to sit for the exam. Mr. Bradshaw explained that this requirement was repealed, because if an individual could study on his own and still pass the exam the state did not want to require that person to spend the time or money on an organized class. Mr. Bradshaw explained that he foresees a problem with the 16 hours of pre licensing study. Mr. Bradshaw also explained that while he agrees that 50% of continuing education requirements should be provided by VLTA, he thinks VLTA will have a problem getting the code to state that title agents will have to go to a certain association to fulfill a continuing education requirement.
  - **Ms. Allen** explained that VLTA was instrumental in getting legislation passed which required 16 hours of pre licensing study for title insurance. Ms. Allen explained that VLTA was attempting to mirror the legislation and requirements for title examiners and title settlement agents.
- **Mr. Oglesby** asked whether VLTA was aware of any states that have a licensing scheme similar to the one VLTA is proposing.
  - **Ms. Allen** stated that she is not aware of any states that do. Ms. Allen explained that VLTA has been working with the American Land Title Association which is a national association., and that through her work with ALTA she has realized many states have certification programs like Virginia. Ms. Allen explained that although the certification program is a great idea, it is optional because there is nothing in place mandating that title examiners or title settlement agents must be certified. Ms. Allen explained that consequently, few title settlement agents and title examiners have completed certification.
- **Mr. Oglesby** stated that during his 43 years in the real estate business he has been involved in hundreds of transactions. Mr. Oglesby stated that generally he has not had any problems with title examiners or title settlement agents from within the Commonwealth. Mr. Oglesby stated that one of the only problems he has ever had with the land title industry occurred during one real estate transaction which involved title examiners and title settlement agents from California and Georgia. Mr. Oglesby stated that that particular transaction took 6 months to get the deed recorded after closing and that it was, in short, a nightmare. Mr. Oglesby asked how a regulatory scheme for Virginia's land title industry would affect people that operate outside of Virginia.
  - **Ms. Allen** stated that VLTA thinks that if the land is in Virginia then the title settlement agent or title examiner for that particular transaction must meet the licensing requirements in Virginia.
- **Del. Marshall** asked what percentage of the title examiners and title settlement agents (currently in business in Virginia) does VLTA represent.
  - **Ms. Kiplinger** stated 25%.
- **Del. Marshall** asked whether VLTA backs this idea.
  - **Ms. Allen** stated that VLTA backs the idea to license title examiners and title settlement agents. Ms. Allen explained that whether or not people in the land title industry join VLTA, they get the benefits of everything VLTA does. Ms. Allen stated that many of the title examiners and title settlement agents have said "why should I join the VLTA when I am already getting the benefits of membership without paying dues?"

- **Del. Marshall** stated that of the 75% of the industry that are unrepresented in VLTA, there are probably people who are opposed to the idea.
- **Ms. Allen** stated that since the certification program has begun, more and more people have joined VLTA. Ms. Allen added that VLTA's website includes information about their goal to get title examiners and title settlement agents licensed.
- **Del. Marshall** asked how many title examiners are in VLTA.
  - **Ms. Allen** stated from 350 to 400.
- **Del. Marshall** asked how many title settlement agents are in VLTA.
  - **Ms. Kiplinger** stated about 3,000.
- **Ms. Harris-Braxton** asked who opposes VLTA's idea to license these professionals.
  - **Ms. Allen** explained that no one has come forth with outright opposition for their idea; however, some have complained "if it ain't broke, don't fix it."
- **Mr. Dicks** clarified that 20 years ago, law firms employed title examiners and title settlement agents on a full-time basis. Mr. Dicks clarified that within the last 20 years, law firms have stopped hiring full-time title examiners and title settlement agents or paralegals required to do similar jobs and the individuals in the industry have evolved into unregulated independent contractors.
  - **Ms. Allen** further explained that the title examiners and title settlement agents used to be registered with the Bar but are now registered with the Bureau of Insurance. Ms. Allen explained that the Bureau of Insurance receives complaints from consumers that they are being "ripped off." Ms. Allen explained that this is VLTA's attempt at a solution.
- **Ms. Allen** further explained the problem that the evolution of the industry has caused. Ms. Allen explained that in the old model, title agents were covered under the law firm's corporate license. Ms. Allen explained that now, title agents are completely unlicensed and virtually unregulated so there is no way to assure the quality of their work and there is little recourse available to consumers who have problems resulting from faulty title agents' work.
- **Del. Marshall** asked whether VLTA has talked to anyone from the General Assembly about making this bill a law before.
  - **Ms. Allen** stated that she was informed by her lobbyist to approach the Virginia Housing Commission about it first.
  - **Mr. Toalson** stated that Ms. Allen and Ms. Kiplinger should talk with a specific legislator about their idea and work with the Division of Legislative Services to draft a bill that would meet their needs.
  - **Del. Marshall** stated that that is generally the way things work-- that the workgroup would be unable to recommend an idea to the Commission without seeing a bill.
- **Mr. Mark Courtney**, *Deputy Director for Licensing and Regulations, Department of Professional and Occupational Regulation*; stated that a lot of this issue is related to the SCC and the Bureau of Insurance. Ms. Courtney explained that he is not connected to either of these organizations. Mr. Courtney explained that Virginia's general policy regarding regulating industries is that it is a last resort-- meaning that the state will regulate industries where all other measures have failed to adequately protect the consumer.



- **Del. Dance** stated that she would like to work with Del. Marshall on this issue and figure out whether it should become a bill or whether the Commission will need to perform a study.

**V. Public Comment**

- Del. Marshall opened the floor for public comment.

**VI. Adjourn**

- Hearing no other comments, Del. Marshall adjourned the meeting at 2:50 PM.